UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NOBLE RESOURCES S.A.,	:	
Plaintiff,	:	08 CV 3876 (LAP)
- against -	:	ECF CASE
YUGTRANZITSERVIS LTD. AND SILVERSTONE S.A.,	:	
Defendants.	:	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION OF THIS COURT'S DENIAL OF DEFENDANTS' MOTION TO VACATE AND REQUEST TO CERTIFY THE MATTER FOR SECOND CIRCUIT REVIEW

Plaintiff, Noble Resources S.A. ("Noble" or "Plaintiff"), by and through its undersigned counsel, Tisdale Law Offices, LLC, respectfully submits this Memorandum of Law in Opposition to Yugtranzitservis Ltd a.k.a. Yugtranzit Servis Limited ("YTS"), and Silverstone S.A. ("Silverstone") (collectively "Defendants'") Motion to Reconsider the denial of their Motion to Vacate the Maritime Attachment Order issued and/or their Request to Certify Matter for Second Circuit Review. Because there is no "intervening change of controlling law" in this case, Defendants' Motion should be denied.

RECENT PROCEDURAL HISTORY

By Order to Show Cause dated July 21, 2008 Defendants' filed their Motion to Vacate the Maritime Attachment. Plaintiff filed its Opposition to Defendants' Motion on July 22, 2008 and the parties were heard before this Court on Wednesday, July 23, 2008, at 9:00 a.m. After hearing argument from both sides, Your Honor issued a ruling properly denying Defendants'

motion to vacate the attachment, as well as Defendants' request to certify the matter for Second Circuit review pursuant to 28 U.S.C. § 1292(b). *See Transcript of Oral Argument, attached hereto as Exhibit A.* For all of the reasons below, Defendant's Motion for Reconsideration should be denied.

ARGUMENT

I. DEFENDANTS' MOTION FOR RECONSIDERATION SHOULD BE DENIED

In order for the court to grant a motion for reconsideration, the burden is on the moving party to show that there is "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice" in order for the motion to succeed. *Catskill Dev., L.L.C. v. Park Place Entm't Corp.,* 154 F. Supp. 2d 696, 701 (S.D.N.Y. 2001) (quoting *Doe v. N.Y. City Dep't Soc. Servs.,* 709 F.2d 782, 789 (2d Cir. 1983)). The standard for a motion for reconsideration is strict and will be denied unless the moving party can point to controlling decisions or data that the court overlooked. *Novoship (UK) Ltd. v. Wilmer Ruperti*, No. 07 Civ. 9876 (DLC), 2008 U.S. Dist. LEXIS 47721 at * 3 (S.D.N.Y. 2008). Matters that would reasonably be expected to alter the court's conclusion would be specific examples of decisions that would warrant reconsideration because they show a change in the law, new evidence, or a clear error made by the court. *Id.* This is not such a case.

Furthermore, reconsideration should not be granted when the moving party seeks to re-litigate an issue already decided by the court. *Shamis v. Ambassador Factors Corp.*, 187 F.R.D. 148, 151 (S.D.N.Y. 1999). The moving party may not introduce new facts, issues or arguments not previously presented before the court. *Id. See also Allied Maritime, Inc. v. The Rice Corp.*, 361 F. Supp. 2d 148, 149 (S.D.N.Y. 2004) ("Courts have repeatedly been forced to warn counsel that such motions should not be made reflexively, 'to reargue those issues already considered

when a party does not like the way the original motion was resolved.'") *quoting Houbigant, Inc. v. ACB Mercantile*, 914 F. Supp. 997, 1001 (S.D.N.Y. 1996). Here, the Defendants are making the same exact arguments that were included in their original motion and outlined during the oral argument on July 23, 2008. The Defendants are simply complaining that the Court got it wrong the first time. This is insufficient to justify reconsideration. *See id.*

In addition, at least one recent decision from this District indicates that Your Honor properly decided this case. In the case of *Noble Resources S.A. v. Sarl Ouest Import*, 08 CV 3587 (GEL), the plaintiff filed an application for a Rule B attachment to seek security for an arbitration award issued in its favor against the defendant, Sarl Ouest. The arbitration was commenced because of Sarl Ouest's breach of six sugar contracts it entered into with the plaintiff. The breaches were the result of Sarl Ouest's failure to pay demurrage due and owing to the plaintiff, as per the terms of the several contracts. The arbitration award in favor of the plaintiff calculated the demurrage due as per the terms of the sugar contracts.

Sarl Ouest filed a motion to vacate, challenging the Rule B application alleging that the contracts and arbitration award were not maritime and did not fall within the court's maritime jurisdiction under any circumstance. Judge Lynch denied the defendant's motion for very similar reasons as Your Honor in this case. In addition, the defendant Sarl Ouest relied on the same line of cases that the Defendants cite here in support of their position. Judge Lynch found all of those cases distinguishable and held that the contracts in questions were subject to the maritime jurisdiction of this court. *A copy of the Order and Decision issued by Judge Lynch, dated August 12, 2008, is attached hereto as Exhibit B.*

Case law that has dealt with this very issue of when maritime jurisdiction exists holds that the nature of the dispute under each particular contract must be reviewed in order to

determine whether maritime jurisdiction will stand. The Supreme Court has declined to apply a rule that would automatically exclude all contracts of a certain type from admiralty jurisdiction. *Exxon Corp. v. Central Gulf Lines*, 500 U.S. 603, 612 (1991). Instead, courts "focus the jurisdictional inquiry upon whether the nature of the transaction was maritime." *Id.* at 611. Lower courts are to make a case-by-case assessment of such a contract based on "the subject matter of the... contract" and "the services performed under the contract." *Id.* at 612. That is exactly what Your Honor did in this case, and the result is proper under the applicable case law.

Defendants' focus on one case, which stated that "it has long been held that a non-maritime sale and purchase contract does not become maritime merely because the purchaser entered into a third-party maritime contract..." ignores the relevant language in *Exxon* which directs the court to engage in a fact-intensive inquiry on a case by case basis. *See Defendants' Brief at p. 7.* It further ignores the Second Circuit's opinion in *Folksamerica Reinsurance Co. v. Clean Water of New York, Inc.*, 413 F.3d 307 (2d Cir. 2005) where the court specifically directs the inquiry of whether maritime jurisdiction exists by focusing on the nature of the dispute under the particular contract. Plaintiff's did not argue that the contract here was maritime merely because the purchaser entered into a third-party maritime contract. The Contract between the parties in this case falls within the Court's admiralty jurisdiction because the nature of the dispute thereunder affects maritime commerce and maritime activity.

Furthermore, Defendant's contention that *Aston Agro* is "directly on point and should be followed" is misplaced and merely asks this court to reconsider the same issue it already resolved. In *Aston Agro*, Judge Daniels found that the contract between Agro and Star Grain was not maritime because Star Grain's liability to Aston in that case had nothing to do with any maritime obligations of the wheat contract. *Agro-Industrial AG v. Star Grain Ltd.*, 2006 U.S.

Dist. LEXIS 91636 (S.D.N.Y. 2006). The court in *Aston Agro* itself limits the scope of that holding to the fact pattern in that case. *See eg., Opinion and Order in Noble Resources v. Sarl Ouest Import, attached as Exhibit 2, at pp. 9-11 (transcript pp. 17-18; 22-23).*

Defendant further argues that this Court "missed the point" when it considered whether maritime transportation was "integral" to the contract. Instead, Defendant contends that the Court should have applied the "principle objective" standard. But this is merely a matter of semantics, which fall far short of the "intervening change of controlling law" requirement which a moving party must meet for a motion for reconsideration. For all of these reasons, Defendants' motion for reconsideration should be denied.

II. THIS CASE IS NOT APPROPRIATE FOR CERTIFICATION FOR INTERLOCUTORY APPEAL

Certification of the matter for interlocutory appeal requires that the challenged order involve a controlling question of law as to which there is substantial ground for difference of opinion and that such immediate appeal may advance the ultimate termination of the case. *See* 28 U.S.C. § 1292(b). In this case, however, there are not substantial grounds for difference of opinion and an immediate appeal will not likely advance the termination of this case. This is clear from the Defendants' own brief wherein they fail to cite any authorities in support of their request for certification of the matter for appeal to the Second Circuit. *See Defendants' Brief at pp 9-10.*

The standard for certification requires that there be a significant question of controlling law. Your Honor correctly noted that, "The controlling law is not at all at issue in this case." *Transcript, Exhibit 1, p. 9. See also Exhibit 2.* Defendants merely disagree with Your Honor's application of the relevant precedent to the facts of this case. Furthermore, it has been held that

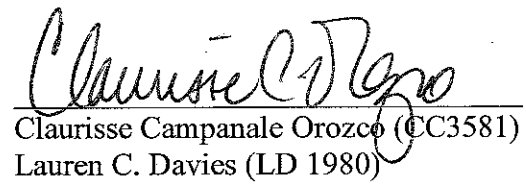
certification for interlocutory review "should be strictly limited because 'only 'exceptional circumstances' [will] justify a departure from the basic policy of postponing appellate review until after the entry of fial judgment.'" *Flor v. BOT Fin. Corp.*, 79 F.3d 281, 284 *quoting Klinghoffer v. S.N.C. Achille Lauro,* 921 F.2d 21, 25 (2d Cir. 1990). No such circumstances have been alleged by the Defendants and thus this case is not appropriate for interlocutory appeal.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, it is respectfully requested that this Court deny Defendants' motion for reconsideration and for certification for interlocutory appeal.

Dated: New York, NY
August 20, 2008

The Plaintiff,
NOBLE RESOURCES S.A.,

By: 

Claurisse Campanale Orozco (CC3581)
Lauren C. Davies (LD 1980)
TISDALE LAW OFFICES, LLC
11 West 42nd Street, Suite 900
New York, NY 10036
(212) 354-0025 – phone
(212) 869-0067 – fax
corozco@tisdale-law.com
ldavies@tisdale-law.com

EXHIBIT 1

87N6NOBL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

NOBLE RESOURCES,

Plaintiff,

v. 08 CV 3876(LAP)

YUGTRANZITSERVIS and
SILVERSTONE,

Defendants.

----------x

New York, N.Y.
July 23, 2008
9:45 a.m.

Before:

HON. LORETTA A. PRESKA,

District Judge

APPEARANCES

TISDALE LAW OFFICES, LLC
Attorneys for Plaintiff
BY: CLAURISSE OROZCO

CHALOS & CO.
Attorneys for Defendants
BY: GEORGE M. CHALOS

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

87N6NOBL

(Case called; in open court)

THE COURT: Counsel have very graciously agreed to prepare their papers quickly so that the hearing required to be conducted quickly on a motion to vacate a maritime attachment could take place promptly. I am grateful to counsel for doing that.

Defendant argues first that the contract at issue is not subject to maritime jurisdiction. We all agree to the law which is that the threshold inquiry examines the subject matter of dispute as opposed to the underlying contract. To determine if an issue related to maritime interests has been raised, an issue will not give rise to maritime jurisdiction if the subject matter of the dispute is so attenuated from the

business of maritime commerce that it does not implicate the concerns underlying admiralty and maritime jurisdiction.

As the Court of Appeals acknowledged in FolksAmerica, Reinsurance Co. v. Cleanwater New York, Inc., 413 F.3d 307 (2d Cir. 2005) the court directed that the jurisdictional inquiry be focused upon whether the nature of the transaction was maritime and observed that the fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce.

Here, the contract itself makes clear that maritime transportation was integral to the agreement. For example, the

contract provided that Plaintiff Noble would purchase a cargo from YTS and the contract set out in great detail the conditions for transportation and delivery.

The contract set out in the portion under delivery the window of dates open for loading in the specified port, that portion of the contract also required that the vessel nominated by buyers was required to tender her notice of readiness at the designated port. It set out how the loading of the vessel was to be effected. It set out in great detail the type of vessel that would be acceptable, that is, "A self-trimming bulk carrier, single-decker vessel suitable for direct loading (wagon-board of the vessel)."

The Contract also provided that the vessel could be -- should be confirmed or rejected by sellers in writing and, in fact, here the sellers rejected the first three vessels that were nominated eventually accepting the Southgate.

The contract further set out the preadvise that buyers were to give the sellers of the vessel's ETA, name, flag, dimensions, hatches and hold dimensions and alike. It set out in detail the loading instructions, the loading rate, detailed the notice of readiness and the laytime and the demurrage, among other provisions. So the underlying contract certainly touched upon the business of maritime commerce.

In addition, the dispute between the parties also touches upon the maritime commerce. As set out in plaintiff's

claim submissions in the arbitration, and perhaps more importantly as reflected in the award, the dispute centered on two issues. First, the default by YTS in failing to provide a berth for the vessel after she had tendered her notice of readiness and refusal to load the vessel constituting a default under the contract. And, secondly, a request for wasted vessel costs, that is, the costs incurred by the vessel following tendering of her notice of readiness.

As set out in the award damages were awarded for both these items and indeed there was a lengthy discussion in Section 6 of the award about the wasted costs incurred on account of the vessel's lack of use because of defendant YTS's default. The wasted vessel expenses included bunkering costs, port and survey costs, and hire payments, all clearly within the maritime jurisdiction.

For all those reasons, I find that the contract and dispute at issue fall within the Court's maritime jurisdiction.

The question has also been presented as to whether or not the guarantee by Silverstone falls within the Court's

maritime jurisdiction. As the Court has set out recently in C Transport Panamax, Ltd. v. Kremikovtzi Trade, et al., 07 CR 893 (June 19, 2008 S.D.N.Y.) courts in this circuit and elsewhere have long held that an agreement to act as a surety on a maritime contract is not maritime in nature. They have recognized that the same is not true of an agreement to

guarantee the performance of a maritime contract.

See e.g. Compagnie Francaise, DE Navigational Avapeur v. Bonnase, 19 F.2d 777, 779 (2d Cir. 1927) (L. Hand, J).

Here the guarantee by Silverstone specifically states "The guarantor (Silverstone) irrevocably and unconditionally, A, as principal obligor guarantees to the Buyers the prompt performance by (YTS) of all its obligations under the Contract...." Accordingly, the guarantee at issue here based on longstanding Second Circuit law falls within the meaning of maritime contracts.

Finally, with respect to defendant's argument that the matter is not ripe, the arbitral award has ordered that the payment be made and it has not yet been paid. Accordingly, the matter is ripe with respect to the guarantor. In addition, it is most frequently the case that Rule B attachments are used to provide security for arbitral awards and that has been the use here. Accordingly, defendants' motion to vacate the attachment is denied.

THE COURT: Is there anything else today?

MR. CHALOS: Yes, your Honor, two points if I may.

THE COURT: Sir.

MR. CHALOS: We thank the Court for hearing us on an expedited basis. We would first off like to make an application to the Court to reduce the amount of security. On page 14 of the award, the panel clearly sets forth that the

plaintiff was awarded $3,362,400 and no more as the words of the panel. Here the amount of the order attachment is almost double that. It is significantly more.

THE COURT: What is the story with the interest, Mr. Chalos?

MR. CHALOS: According to the panel, it is 7.5 percent beginning August 16, 2007. That is only one year's worth of interest. Surely this can be resolved in the next, I would assume, six months or so with the upcoming appellate deadlines.

THE COURT: Has anyone done the calculation of the interest?

MS. OROZCO: I have, your Honor. But I would just like to speak on that point. The panel awards the amount less than we had sought in our application, but it also awards interest 7.5 percent from the date of the default until it is paid and it also awards costs of arbitrator, not legal costs.

We have attached to date as outlined in my declaration $4 million. It is paragraph 34 of my declaration at page 6. We have not calculated the interest out for a year. What we have done is calculated it out for three years, which is normally what we undertake in anticipating appeals and that sort of thing. If we allow for three years of interest, security for three years of interest, plus the costs of the Gafta arbitration, the security that we would be entitled to

would be $4,225,000.

So we are at this time undersecured by 200,000. However, if the Court wants us to reevaluate the interest, we would be willing to do so and then release the funds accordingly if that was a proper analysis.

THE COURT: Counsel.

MR. CHALOS: Those calculations are flawed. Those calculations are based on the principal claim of 3.9 million. That is not what the panel awarded. 7.5 percent on the $3.3 million award is about, 21 to $210,000.

MS. OROZCO: I actually calculated the three-year interest on the amount awarded by the arbitrators, which was $3,362,400. And the interest from August 15th, 2007 through August 15th, 2010 is $840,000.

MR. CHALOS: I submit through 2010 is a bit long. I can certainly understand maybe two years, but not three.

Also, seeing as they are already secured from the guarantor's EFTs, I renew my application and dismiss the matter against YTS. They are secured or they are not secured. They have it already attached. There is no in rem quasi jurisdiction over the party whose funds who haven't been attached.

THE COURT: I don't hear counsel going out and seeking further attachments here.

MR. CHALOS: But they would, though. That is the point if they sought to move money. In fact, in the papers

that counsel submitted last night, they said exactly that they would do that. If they wound up -- U.S. dollar transfers on behalf of Yugtranszitservis came through New York, they would catch that and release monies belonging to the guarantor.

THE COURT: What do you say to that, counsel?

MS. OROZCO: Was that was a statement that we made. That statement as made with respect to the application of the New York CPLR in that case, which we didn't address and we say we are not applied. We actually have stopped serving the writ of attachment in this case and we are no longing serving on any of the defendants.

THE COURT: First, I decline to reduce the amount.

Second, obviously counsel knows that plaintiff may not be oversecured. If, Mr. Chalos, you find that plaintiff is attaching more than the four million two number -- is that the total number? Please remind me.

MS. OROZCO: Yes. The total number is comprised of $3,362,400 of principal pursuant to the arbitration award issued on July 4th, 2008, with the rate of interest calculated at 7.5 percent which is also the rate awarded for three years from August 15th, 2007 through August 15th, 2010. The interest on that amount is $840,501.

In addition, the arbitration award also allowed costs, Gafta costs, to the plaintiff and the Gafta costs incurred were 23,000 U.S. dollars. So the total security we would be

entitled to or we would be seeking is $4,225,901.
THE COURT: To the extent, Mr. Chalos, counsel attaches more than that, you let me know.
MR. CHALOS: Thank you, your Honor.
Finally, your Honor, we would like to ask the Court to certify this for immediate appeal to the Second Circuit.
THE COURT: I will take a letter on that.
How is this a complex or novel issue?
MR. CHALOS: Well, it is a novel issue in the sense that the Court has for the first time found a Gafta contract to be within the meaning of a maritime contract and a maritime claim under Rule B. It stands starkly in contrast to Judge Daniels' decision as to Aston Agro as well as Judge Sullivan, I am not sure about that, in the Tan Shan case. These exact arguments were presented there with a 180-degree different result and I do believe that if we can bring this to a head Second Circuit level promptly that would help provide some clarity on these types of issues.
THE COURT: The law is not in doubt. It is the application, right?
MR. CHALOS: Well, I think the law is in doubt in a sense that our position is that the Court needs to look to the primarily objective of the contract. Our argument has been that the primary objective of the contract is one of sale and purchase.

THE COURT: I didn't see any of the Second Circuit cases talking about the primary objective of the contract.
MR. CHALOS: Well, I think we set out the argument based on the precedent of Judge Daniels' decision, which can be found for the Court's reference on page 3 of the Aston Agro decision where he writes, In this case the contracts are not maritime contracts because they are primary objective was not the transportation of goods by sea. Instead, their primary objective was undoubtedly the sale of wheat. That the wheat was transported on a ship does not make the contracts maritime contracts anymore than it would make them aviation contracts had the wheat been shipped via airplane. Nor would the contracts between a seller and shipper -- that is true here. the judge in that matter goes on to write, Nor can maritime jurisdiction be exercised under an exception to the general rule that maritime jurisdiction "Arises only when the subject matter of the contract is purely or wholly maritime in nature. Under the first exception, federal court can exercise --
THE COURT: Counsel, do you want this taken down? If you do, you better read so the court reporter can take it down.
MR. CHALOS: The Court has it before it.
THE COURT: So you don't need to read it.
MS. OROZCO: May I respond?
THE COURT: Yes, ma'am.
MS. OROZCO: The key to the quotes by defendant from

the Ashon Agro case is the first line where it says, "In this case." and further or in the quote Judge Daniels says that based on the facts of that particular case they are not within the maritime jurisdiction.
I would just like to point out that the Exxon case,

500 U.S. 603, 612 reminds us -- this is the U.S. Supreme Court -- reminds us that courts are required to look to the subject matter of the relevant contract. And in this case the relevant contract, the Noble YTS contract, provides maritime jurisdiction.

MR. CHALOS: Your Honor, this is the shifting sands that I have been arguing again. The Court is required to look to the nature of the contract, not the dispute. Twenty minutes ago counsel was arguing the Court needs to look to the dispute and I rejected that. The contract is a sale and purchase contract, not a maritime contract. It is not maritime contract with third parties. We had nothing do with it. My clients had nothing to do with it. That is the dispute here. If you look to the nature and substance of the contract, we are selling and they are buying. Full stop. It is the sale and purchase contract.

In fact, your Honor, that was precisely what was addressed by Judge Daniels. He writes here invoking the first exception, Aston contends that maritime jurisdiction exists because the particular claims at issue involve only the

maritime portions of the contracts, and it was rejected, which is precisely the argument presented by plaintiff. Our opposition is precisely the argument adopted by Judge Daniels.

THE COURT: The Court denies the request for certification under 28, U.S.C., Section 1292(b). The controlling law is not at all at issue in this case. Everyone agrees on the cases that should be looked to for guidance. The only dispute is the application of those cases to the facts of this case as opposed to the facts of other cases. Accordingly certification for immediate appeal is denied.

Anything else, counsel?

MR. CHALOS: Nothing further, your Honor.

THE COURT: Thank you, ladies and gentlemen. Thank you for your excellent arguments.

o0o

EXHIBIT 2

88C9NOBA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

NOBLE RESOURCES SA,

Plaintiff,

v. 08 CV 3587 (GEL)

SARL OUEST IMPORT,

Defendant.

----------x

New York, N.Y.
August 12, 2008
10:15 a.m.

Before:

HON. GERARD E. LYNCH,

District Judge

APPEARANCES

TISDALE LAW OFFICES, LLC
Attorney for Plaintiff
BY: CLAURISSE OROZCO

CICHANOWICZ, CALLAN, KEANE, VENGROW & TEXTOR, LLP
Attorney for Defendant
BY: JOSEPH F. DeMAY, JR.

88C9NOBA

(Case called)

MS. OROZCO: Good morning, your Honor. Claurisse Orozco from Tisdale Law Offices for the plaintiff, Noble Resources.

THE COURT: Good morning.

MR. DeMAY: Good morning. Joseph DeMay, Jr. from Cichanowicz, Callan, Keane, Vengrow & Textor for the defendant.

THE COURT: Mr. DeMay, good morning.

Well, I think that what is technically before me is a request for a hearing on a potential motion to vacate an order for marine attachment. The parties have written a number of letters to the court regarding that. It's my impression -- and I think it's been confirmed by my law clerk -- that the parties have fully briefed the merits of the issue and that what we're

really here to do today is to have oral argument towards deciding the motion to vacate the attachment.

Is that everybody's understanding, or does anybody think we need more of anything?

MS. OROZCO: No. That's my understanding, your Honor.

MR. DeMAY: Oral argument, your Honor.

THE COURT: Very good.

So, I think what I'd really like to hear -- I suppose starting with the defendant as the movant -- is an account from each side of what they think is at issue in the arbitration in this case; that is, what are the factual issues and legal

issues that the arbitrators had to decide.

Mr. DeMay.

MR. DeMAY: Your Honor, I'll confess that I was not fully briefed on the arbitral aspect of it. Our application and our retention as attorneys was directed solely toward the propriety of the maritime attachment. For that purpose, we have assumed, for argument's sake only, the validity of the arbitration award, and the accurate and true condition of the contracts of sale that the plaintiff has already provided.

THE COURT: Yes. I'm not so much concerned with the merits of the arbitration. But, as I understood it, your argument is that this is really not a maritime case.

MR. DeMAY: Yes, your Honor.

THE COURT: And on reading the arbitration award, it seemed to me that what the arbitrators were concerned with was what, as a nonadmiralty lawyer you'll forgive me for calling, boaty things; assumed to be about what happened to the ship and why it was late and things of that sort.

And I wanted to give everyone a chance to address that in case I misperceived what was the -- what is the real dispute between the parties because it sounded to me, in my landlubber way, to be a maritime kind of dispute.

MR. DeMAY: Your Honor, my understanding is that what we're talking about here are essentially pricing terms. The sales contract were just that. They were contracts for the

sale of sugar.

Under like the contracts in Judge Preska's case, which has already been provided to you, these particular contracts made reference to the ship.

They made reference to the fact that the buyer, our client, would be responsible for certain discharging costs, and they provided references to the charter party by which those costs would be calculated.

My understanding, however, is that unlike the typical maritime case, our client did not assume any direct obligation toward the operation or navigation of the ship. In other words, the contract for the sale of the sugar made reference to the operation of the ship, made reference to things like demurrage. But I think the case law is fairly clear that simply making reference to those things do not give rise to a maritime obligation. The maritime obligation arises when you assume an obligation that directly relates to the operation and navigation of a ship in commerce on the high seas.

THE COURT: Well, I mean it seems to me that there

are, as I've understood the case law, two different kinds of ways in which a contract can give rise to admiralty jurisdiction. The one is, as you say, where the contract itself is predominantly about maritime issues. And I'd have to agree with you, this looks more like, for example, the case that I have that the parties cited in that it's really a

contract for the sale of goods that says: Well, but by the way, it's going to be going by ship.

But then there is a separate issue where the claim at issue arises from a breach of the maritime obligations that are part of the contract. And it seemed to me that what the parties were actually fighting about here was the maritime part of the contract. In other words, they were concerned about what the demurrage costs were going to be based on what happened at sea.

Am I wrong about that?

MR. DeMAY: No, your Honor. To the extent that this is a demurrage claim, that's absolutely correct. And the contract does make provision for our client to reimburse the seller for all demurrage costs that they incur.

But demurrage is primarily an obligation that's incurred by the charterer, in this case the seller, to the vessel owner. Our client, the buyer, is neither the charterer nor the vessel owner.

What they did, in effect, was to say that: We, the buyer, will indemnify or compensate you, the seller, for whatever demurrage costs that you incur during the performance of the charter party.

And think the case law is clear that unlike a situation where somebody, say a guarantor, assumes the direct performance and obligation to the vessel owner, where you

merely take or undertake to indemnify or compensate somebody for a maritime obligation that they have incurred, that obligation to pay, to indemnify, is not itself a maritime obligation.

It is inevitable if you've undertaken to compensate or indemnify somebody for a maritime obligation that the dispute will necessarily center on the details of that maritime obligation. But, here the maritime obligation was not our client's maritime obligation. It was first and foremost the seller/charterer's obligation, and our client was merely called upon to indemnify, which meant that inevitably that the details of the charter party of the performance would have to be raised. But that's not the same thing as saying that our client undertook a maritime obligation, undertook to compensate the charterer for its maritime obligations.

THE COURT: I see. So you're saying even if the dispute was in substance about the facts of what occurred at sea, that your obligation here was purely to pay whatever the chartering party had to pay in demurrage costs?

MR. DeMAY: Exactly. The contract for sale set out the way in which that compensation would be calculated. But that is essentially the case.

THE COURT: Again, when you say the contract for sale set out the way in which it would be calculated, what did the

contract of sale say?

Again, it seems to me that your argument works best if the contract simply says whatever the -- am I using the right terminology -- the chartering party has to pay in demurrage costs, you will reimburse, not us. And we don't care whether -- what the rights and wrongs are of that charge. Whatever he gets charged, you will pay.

And in that event, you would not have a dispute about whether the charges were correct or about anything maritime at all. It would simply be: Here's the bill that we were presented and you better pay it.

MR. DeMAY: That would be the cleanest way of doing it. But in commerce, it is not unusual that the parties bargained for whatever advantage they can get. And it was certainly open to the parties in this case, in our case the buyer, to negotiate with the seller that, yes, it would be responsible for demurrage but only within certain parameters and on certain conditions.

So that the mere fact that they tried to cut themselves a better deal than the seller/charterer might have had with the vessel owner, I don't think changes the essential fact that they're not assuming a maritime obligation. They are assuming a payment obligation.

THE COURT: But the obligation then is very similar to the payment obligation that would occur if the contract simply said we're responsible for getting the ship to port and if you

don't get there you pay demurrage, right?

I mean it winds up being the same thing. Once you incorporate the maritime issues into what has to be paid, you're essentially talking about a very maritime kind of set of issues, aren't you?

MR. DeMAY: Yes. The issues can be maritime. I don't think that's determinative.

THE COURT: I see.

MR. DeMAY: The question is: Are the obligations maritime? And, of course, if, as I said before, you're talking about having the buyer, having to compensate the seller, for money incurred in the performance of maritime obligations, unless the seller has somehow undertaken to directly assume an obligation to the shipowner, I don't see that it's a maritime obligation; it's simply a payment obligation that has reference to maritime issues.

THE COURT: I see. And that further explains why you would take the position that I really shouldn't worry very much about what the arbitrators had to do? I should just look at the contract itself to decide what the nature of the obligation is that the parties are disputing?

MR. DeMAY: Yes, your Honor.

THE COURT: Okay. That's very helpful. Thank you.

Ms. Orozco, what's your view?

MS. OROZCO: Well, clearly, I disagree with Mr. DeMay.

I think that the dispute here is clearly a maritime dispute. And I think that the case law requires us and directs us to look at the nature of the dispute of this particular contract. That's what the Second Circuit has directed in Folksamerica.

And I believe that the very dispute in this case, which is admitted by both parties, is identified in the arbitration award. And I think that the arbitration award is important because it outlines and indicates what the parties' understandings were and what their rights and obligations were under the contract. So, I think that the arbitration is important.

But before getting to the arbitration award, the contract itself has very specific maritime provisions. Each of the six contracts are generally the same. The only differences being the date, the quantity of goods to be shipped, and the vessels.

THE COURT: Can you point me to where in the voluminous materials I will most easily find the contracts so I can follow?

MS. OROZCO: They are -- to my letter dated July 8, they are Exhibits 1 through 6. They are all generally the same.

THE COURT: Okay. Got it.

MS. OROZCO: If you go to the fourth page of the contract under discharging conditions --

THE COURT: Okay.

MS. OROZCO: -- it specifically identifies and specifically states that all of the discharging costs are for the buyer's account, in this case the defendant.

So, there is no secret or no hidden agenda. It's basically any discharging costs, discharging, port expenses, demurrage incurred, any other vessel-related costs that would be incurred are for the buyer's account.

More importantly, in this particular contract -- each contract identifies the vessel, as well. So, the buyer's already aware of the discharging terms, the conditions, the payments they are going to incur, the vessel that is going to be nominated, And I think what's very important is the very last sentence says, "All of the other conditions to be in accordance with the amended version of the Sugar Charter Party Form 1999."

The arbitrators, when they were reviewing their award, made a note at page 4 of the arbitration award, which is your Exhibit 7, in paragraph 6. They stated and they recognized that at the oral argument hearing during the arbitration both parties agreed in accordance with clause 22 of the standard sugar charter party 1999, which was incorporated into each of the six contracts, gross weight, rather than net weight, was relevant.

This statement was made for the purposes of

calculating the demurrage rate. But what's, I find -- I think is very important in this particular case is that the charter parties were incorporated. And to the extent that the discharging conditions in the standard form were different than this particular contract, this particular contract would

govern. But otherwise, all of the standard terms of the sugar charter party were incorporated.

In addition --

THE COURT: So, looking back at the contract for a moment, the contract doesn't, in your view, simply say that there's going to be reimbursement of costs; instead, you're saying that the contract provides specifically for terms about, for example, how the vessel is going to be discharged?

MS. OROZCO: Yes.

THE COURT: And those are provisions between these parties, not involving the shipowner. They are between these parties. And they are agreeing as to how the vessel is going to be discharged and what -- when lay time is going to count and when it's not going to count; and how the demurrage is going to be settled; and what the water draft is at the port of discharge. These are all obligations that the buyer is guaranteeing, not something that the buyer is just going to pay costs that somebody else incurs?

MS. OROZCO: Yes. I believe -- my position would be, your Honor, that this is not at all an indemnity provision. If

it was an indemnity provision, I think it would say it was an indemnity provision.

In the case of Aston Agro v. Star Grain, which the defendant had cited in one of their letters, which is a case of Judge Daniels, it was a sales contract, and I believe it was for the sale of wheat, I don't recall off the top of my head.

But, in that particular case, the issue before the court and what the court stated was with respect to the demurrage obligations in that case, it was not clear under the contract which party would pay for or incur demurrage.

In that case, Judge Daniels found that it may very well just have been an indemnity provision. But the demurrage clause in that contract just said demurrage to be calculated in accordance with the charter party. So at the time of entering into the contracts in this case, the defendant was very much aware that it was obligating itself to pay demurrage.

In addition, the arbitration decision --

THE COURT: Now, again, just to go back to this.

MS. OROZCO: Yes.

THE COURT: I cited a moment ago various provisions in the contract that seemed to be of a maritime nature, but it's not clear to me -- I suspect it's the other way -- it's not clear to me that those were -- the ones I cited are the -- what the dispute was about. No one was fighting about whether there was lay time on a Thursday afternoon, I take it.

So, what exactly -- well maybe they were. There's a lay time allowance being calculated. There is an effective demurrage -- on demurrage of rain periods during the discharge.

What contract provisions do those disputes fall under?

MS. OROZCO: Those disputes fall under the discharge conditions. And to the extent that they are not outlined within the discharging conditions of the particular contracts, then the sugar charter party form would come into play.

And at page 2 of the arbitration award in the overview paragraph, it's clearly stated that Noble, the plaintiff in

this case, their claims are for demurrage which were incurred. And Ouest Import, the defendant, admitted that the demurrage costs were incurred. But, the dispute was the defendant had counterclaims for dead freight and for dispatch -- I'm sorry, not dead freight -- dispatch and discharge port fines.

So, it wasn't a question of: Do we owe demurrage or not? It was a question of how demurrage is calculated, and how do we treat lay time periods, how do we treat rain delays, how do we treat lack of bills of lading at the discharge port. Those were the disputes.

Just two more important points. If it was an indemnity contract, perhaps the issue would be: You paid the charterer -- Noble, you paid the owner too much money and we don't think we should indemnify you. But, it's not. It's a dispute of how to calculate, when does lay time run.

More importantly, on page 9 at paragraph 25 and page 10 at paragraph 27 in the arbitration award, the defendant in this case relied on charter party case law in London to support its positions. So I don't think that it's -- I think that the parties were very much aware of the maritime nature of the obligations with this particular dispute.

And I think that this case is very similar to the Noble v. YTS case that I submitted to your Honor, recently decided by Judge Preska. I think that these are clearly maritime obligations.

THE COURT: Okay.

Mr. DeMay, any last words?

MR. DeMAY: Yes, your Honor.

Number one, I disagree that this case is on all fours with Judge Preska's decision. If you look at Judge Preska's decision, I think on the second page she outlines a number of details that were present in those contracts that are not present in these contracts.

Number two, I believe only four of the six contracts actually named the vessel. Two of them do not.

Number three, I take issue with the notion that the charter party was incorporated. What it says is that, "All of the other conditions to be in accordance with the amended version of the sugar charter party." And "conditions" in that sense has to refer to the caption, which is discharge

conditions.

So, once again, all the parties have done is to refer to another document as a standard by which they determine their own obligations.

The notion that the buyer guarantees the minimum water draft, again, that's fine if the guarantee is being made directly to the vessel owner, where it certainly then would be a maritime obligation. But as between two businessmen, a buyer and seller of sugar, that means something else. It simply means that the buyer says: If the water draft is not 99 feet, we'll compensate you for damages suffered as a result of that. And the notion that if this were intended to be an indemnity provision, they would have said so.

This is a businessman's contract. And I think it's unreasonable to assume that businessmen would necessarily

phrase their obligations as would an attorney.

THE COURT: I understand. I think I'm prepared to rule.

As I said, what's before the court is effectively a motion by the defendant to vacate an order for the process of maritime attachment. The underlying dispute concerns a series of agreements between the plaintiff and defendant for the sale of sugar. A dispute arose between the parties regarding the performance of those contracts, and following arbitration a panel awarded the plaintiff $674,558 in outstanding demurrage

charges owed by the defendant.

The plaintiff then sought this order of maritime attachment in an attempt to satisfy that judgment which remains unsatisfied.

The defendant contests the existence of federal admiralty jurisdiction, which is of course a prerequisite to the applicability of the rules governing maritime attachments.

After hearing argument and reviewing the papers submitted by the parties, for the following reasons the court denies the defendant's motion to vacate the order for maritime attachment.

Traditionally, the rule was that a federal court could exercise admiralty jurisdiction only over "contracts, claims, and services, purely maritime," in nature. That's Rea v. The Eclipse, 135 U.S. 599, 608 (1890). However, that rule has loosened considerably and today mixed contracts, those containing both maritime and nonmaritime provisions, can be subject to admiralty jurisdiction in two situations. As set forth by the Second Circuit in Folksamerica Reinsurance Company v. Clean Water of New York, Incorporated, 413 F.3d 307, (Second Circuit 2005), those situations are, first, where "the principal objective of a contract is maritime commerce," and second, where the claim at issue in the dispute, "arises from a breach of maritime obligations that are severable from the nonmaritime obligations of the contract." And that quotation

is from page 315 of the opinion.

It's clear that the first situation does not apply here. The contracts in this case deal primarily with the sale of goods. Each is styled as a "Confirmation of Sale." See Exhibits 1 to 6 of the plaintiff's letter of July 7, 2008.

Each of the contracts sets forth the standard terms one expects to see in a contract for a sale of goods, including a buyer, a seller, a price, quantity, and quality.

The contracts also set forth the terms of payment.

The contracts do, however, specify some details about shipment. Some indicate shipment dates and others the actual ships to be used. The contracts specify that "discharging costs" are to be borne by the buyer. See, for example, Exhibit 1 to the plaintiff's letter of July 7, 2008.

But, the contracts are not themselves contracts for the carriage of goods and they clearly contemplate separate bills of lading to be negotiated between the seller and a third party carrier.

Materially similar contracts were found not to have maritime commerce as their principal objective in Aston

Agro-Industrial AG v. Star Grain Limited, 2006 U.S. District Court, LEXIS 91636, (Southern District of New York, December 20, 2006). Star Grain considered contracts for the sale of wheat that contained some details about the shipment of the wheat such as, "the conditions under which the shipment and

unloading of the wheat should occur," and how demurrage costs were to be calculated. See pages 1 to 2 of this opinion. The court held that despite these details, the contracts' "primary objective was undoubtedly the sale of wheat," not "the transportation of goods at sea," at page 9.

Similarly, in Shanghai Sinom Import and Export v. Exfin (India) Mineral Ore Company, 2006 A.M.C. 2950, (Southern District of New York 2006), an oral opinion, this court, that is I, considered a contract for the sale of iron ore that also included maritime provisions "requiring the ore to be shipped by sea and specifying certain requirements regarding the conditions for such shipment." 2006 A.M.C. at 2950. Noting the dangers of interpreting federal maritime jurisdiction too broadly, this court decided it did not have jurisdiction because the contract was "essentially a land-based contract for the sale of goods," at page 2954.

Although the contracts here clearly contemplate shipping, the bulk of the contracts are devoted to defining terms of sale rather than terms of transport. The fact that the movement of the goods over sea is essential to the performance of the contract does not by itself make a contract maritime. If that were so, then any contract for the sale of goods between countries on different continents would become maritime law. The court does not find support for so broad an interpretation of its maritime jurisdiction. For similar

reasons, that the contracts for sale of goods incidentally specify some terms of transport does not make their principal objective a maritime one.

The second basis for admiralty jurisdiction, however, is where the dispute "arises from a breach of maritime obligations that are severable from the nonmaritime obligations of the contract." That is to say, to the extent that the contracts here are mixed contracts, if the dispute concerns those parts of the contracts that are maritime in nature, then this court has jurisdiction. Because the dispute does concern those parts of the contract that are maritime in nature, this provides a basis for the court's jurisdiction.

The dispute here centers on the payment of demurrage that resulted from delays in the discharge of ships' cargoes at their destination ports. Resolution of the competing claims required the arbitration panel to analyze a number of obligations under the contracts. These included provisions relating to the assignment of discharging costs, conditions for the commencement of discharge, the calculation of demurrage rates, and the parties' obligations under related bills of lading, letters of credit, and a charter party. See, for example, the interim final arbitration award, Exhibit 7 to the plaintiff's letter of July 7, 2008 at pages 7, 17, 19, 24, 33, and many other places.

Such obligations fall squarely within the court's

20

88C9NOBA

admiralty jurisdiction. In deciding whether obligations are maritime in nature, the test is, "whether the subject matter of the dispute is so attenuated from the business of maritime commerce that it does not implicate the concerns underlying admiralty and maritime jurisdiction." That is from Atlantic Mutual Insurance Company v. Balfour Maclaine International Limited, 968 F.2d 196, page 200, (Second Circuit 1992).

Far from being attenuated from the business of maritime commerce, discharge of cargo, calculation of demurrage, bills of lading, and letters of credit are subjects intimately connected to the business of maritime commerce. Federal adjudication of disputes over such matters serves the goals of admiralty jurisdiction in providing "a neutral federal forum and a uniform body of law to adjudicate rights and liabilities as they relate to the trafficking of sea-faring vessels," from the same place in the Atlantic Mutual case. Consequently, admiralty jurisdiction is warranted over disputes between the parties arising out of these obligations.

Reference to the contract at Exhibit 1 clearly provides for a variety of obligations that the buyer in this case undertook, which are not simply obligations to pay but are obligations to see to certain performance, and that performance relates to things like how the vessel should discharge, how lay time should be treated, even what the water draft should be at the port of discharge, and furthermore, the parties then

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

21

88C9NOBA

incorporate additional provisions from an underlying charter party.

Mr. DeMay argues, as a very well made argument, indeed, that these are simply conditions of payment. But, of course, all conditions between commercial parties, maritime and otherwise, boil down to agreements to pay if the conditions that are established are not satisfied. And these are no different in that regard from any other provision that specifically requires that vessels be discharged in particular ways. All such provisions boil down to an agreement to pay damages or pay costs in some way if those conditions are not met.

The question is: What are you paying for? And here, it seems clear, that what the buyer is agreeing to do is to pay certain specifically maritime obligations are not met, or to pay for particular shipping costs, to be calculated in ways that, quite understandably, are referred to arbitrators with expertise in admiralty matters, who then proceed to decide the case by reference to various maritime commercial concepts.

Anyone who reads the arbitration agreement, it seems to me, is forced to the conclusion that what these parties are disputing in this case is nothing related to the sale of sugar but is everything related to the proper conduct of the vessel with respect to discharging the conduct.

Now, the parties have cited a number of district court

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

22

88C9NOBA

cases. And, of course, it's worth remembering that none of

these cases, whoever cites them and whichever side they seem to fall on, are binding authority in this court. Nevertheless, the court respects the value of consistency and the importance of considering those cases and specifically respects the expertise of the judges who decided them.

So, I have considered those cases. And it seems to me that the holding in Star Grain, the principal case on which the defendant relies, is not really to the contrary. That case was similar to this one insofar as the claim there was also for the payment of demurrage. However, as I read the case, the claim in Star Grain arose not out of a specific obligation in the contract with regard to demurrage but ultimately from a standard contract term that assigned the risk of loss of goods during transit to the buyer. See page 14 of 2006 U.S. District Court LEXIS 91636.

Because the demurrage was the result of damage to the goods during transit, the dispute centered on this standard nonmaritime contract term and not on parts of the contract that were, "uniquely maritime," quoting from page 12 of the opinion.

Now, it's not entirely clear to me that the uniquely maritime standard applied in Star Grain is exactly consistent with the standard laid down by the Second Circuit in Atlantic Mutual Insurance, which seems to me to put the burden to some degree -- the presumption in the other direction saying that

the provisions are not maritime if they are so attenuated from maritime commerce as opposed to that they are only to be considered maritime if they are uniquely maritime.

It may be that the court in Star Grain applied a narrower rule of maritime jurisdiction than the Second Circuit law justifies.

But this case is sufficiently different from Star Grain that I don't have to decide in any way whether I would decide Star Grain the same way as Judge Daniels did. This case concerns obligations that are common and instrumental features of maritime contracts and not terms that are typical features of contracts for the sale of goods generally.

Accordingly, it's hereby ordered that the defendant's motion to vacate this court's April 15, 2008 ex parte order for process of maritime attachment is denied.

Now, Ms. Orozco, one of the things I always wonder about with these maritime attachment cases is when do they end? What typically happens, it seems to me -- and again, I'm hardly an expert in this stuff -- is that a plaintiff brings an action in this court and seeks maritime attachment by way of gaining security, and then doesn't really have any intention of following up the case. Here, the case is decided in some other forum, usually an arbitral forum. And in this case if I have the timing right, the arbitration actually happened in the first place and then this was sought in aid of execution of the

judgment.

Is this a tempest in a teapot? Do you have money? And if so, how much do you have? And what happens by way of --

MS. OROZCO: Procedurally, we actually have not captured any funds yet. But what the intention would be, would be that in the event we capture funds, we would move to confirm

the award in this court. And once the award is confirmed, which we have no reason to believe it would not be confirmed, it's a London arbitrating, then we would move to secure any security to satisfy that New York judgment.

THE COURT: But how long does this go on? I don't know -- I gather from the fact that Mr. DeMay is here, that the defendant exists and has ongoing business and can afford to retain a lawyer to engage in this dispute. So maybe some day some money will show up in this district.

But, one thing that has concerned me, both from a very, perhaps, pedantic concern for the court's docket, to a more substantive concern about the nature of these attachments, is that it's one thing to attach property that's here, even if that is intangible property. It's another thing to have a sort of open-ended order that will attach something someday if it should appear when there is no particular reason, other than the fact that a lot of money comes through New York, to assume that it's ever going to.

Now, I've had to deal with this issue in other cases

and it seems to me the Second Circuit law is clear that these prospective attachments are valid. It seems to me that the underlying Second Circuit cases are ones precisely in which the district court issued an order saying you could attach some money transfer when nobody actually was aware of a particular transfer being there. So, the validity of this I take as established by circuit case law, but I don't think, as far as I know, that the circuit has addressed: Is this open-ended forever, or at what point is it perfect for a court to say: But there ain't no property to attach, and there never has been, and it's unclear when, if ever, there will be, and why don't we just close this up.

Now, this one hasn't been pending for very long and I don't know that we're close to any point of whatever it might be of closing it down. But, do you have any thought or suggestion as to when this just becomes ridiculous?

MS. OROZCO: I do, your Honor. Actually it's an issue that we deal with. Our general rule of thumb, if we have not caught any funds after about six to eight months -- depending upon what type of information we can find that confirms that the defendant is still in business or that they are not in business or that there are eight other attachments -- if we haven't caught funds after about the six-to-eight-month period, we generally recommend to our client that we dismiss without prejudice. In the future if you have information; you discover

they are trading, they are liquid, we can revisit, perhaps reopening the file. But that is our general recommendation for the same reason of it's overwhelming the courts. It's overwhelming to us, and it's daily service -- it's throwing money -- the client spends money for daily service and they are getting nowhere. And if the company is really not trading, there's really no point. The attachment is there.

It can be -- we've had cases where we've dismissed the attachment and then we've gotten information and refiled and we've caught money within 30 days, but it's generally -- we do put an end to it. We go back to our clients and say, look,

this is -- you know.
THE COURT: Well, of course, that's what you do and you're free to do as you like. The question is --
MS. OROZCO: As are you?
THE COURT: Well, that's the question. Am I? Is this solely a matter for my discretion, or are there any rules that ought to apply here?
Now, at this point -- I just said the date, now I'm forgetting. It was April --
MS. OROZCO: April 12 it was issued. I believe we started serving April 15.
THE COURT: So, it's been four months and nothing has turned up yet. Certainly six months sounds like to me relatively an outside period unless there is some evidence that

something is likely to happen now.
Again, I suppose it's possible that a party could try to simply avoid New York for a period and then if something gets vacated resume normal business practices. I doubt that would be easy to do, but maybe it's possible.
And I suppose, further, that absent the process of daily service and having an open order, you would never really have any way of knowing whether that's resumed.
At any rate, it seems to me that come October this is going to be vacated anyway if there is not some success in attaching something. And I don't know any way of dealing with this kind of problem other than by rule of thumb of that sort.
Mr. DeMay, do you have a thought or -- this is a different issue than what you all came here to talk about, but --
MR. DeMAY: Your honor, I've been on both sides of the transaction. I take it as a given that no Rule B case would be allowed to remain open-ended.
THE COURT: I should think not.
MR. DeMAY: My understanding is that under Rule 4, there's a 120-day limit for service of process. If the defendant is one on whom service of process can be made in the United States, I think that 120-day rule probably would apply absent good cause. If the defendant is located overseas, my understanding is the 120-day rule does not strictly apply.

It's up to the court's discretion; may be applicable in a case where the defendant is located in a western nation where service can easily be made.
But my understanding is that Rule B is essentially equitable in nature. It's subject to the court's discretion. The court can limit the attachment; it can vacate an attachment. So I would read into that, that the court has inherent power, after a passage of time that the court deems to be reasonable, to decide that there is no point in continuing, that the case would have to be dismissed without prejudice.
THE COURT: Well, that sounds about right to me. I think what I've done in the past -- and I don't know whether there's ever been a particular time -- but once I started seeing these things piling up on the docket, I did a little project of just issuing orders saying tell me what's going on. And it turned out that most of the plaintiffs had attached

something during that period and we just didn't know about it. So, they weren't totally dormant. But it seems to me that some sort of time limit is appropriate.

And I guess it sounds as if the practice at the bar so far has been not to include such a time period, an expiration date in the order of attachment itself. And that makes some sense. It may be that leaving this to case-by-case issues and allowing the plaintiff an opportunity to explain why they think, if they do, that the order should be extended after some

period of time, is the best way to go.

But at any rate, what I'm indicating is you can expect that come October either this will be vacated outright or I'll be at least asking the plaintiff for some account of is there any reason they can think of why this should go on. Of course, it's my expectation that the defendant will say no, it shouldn't. And barring some new news, this dispute is resolved now only for the next two months and it may well be that today's order is largely academic.

All right. Thank you very much.

MS. OROZCO: Thank you, your Honor.

MR. DeMAY: Thank you, your Honor.

(Adjourned)